

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2 -----x
3 STEVEN SCHREIBER, individually and
4 derivatively on behalf of TWO RIVERS
COFFEE, LLC,

5 Plaintiff,

6 versus

15 CV 6861 (CBA)

7 EMIL FRIEDMAN; E&I INVESTORS GROUP LLC;
8 E&J FUNDING CO. LLC; E&J MANAGEMENT,
9 INC.; E & JERYG MANAGEMENT CORP, LLC;
10 24 HOUR OIL DELIVERY CORP.; MB FUEL
TRANSPORT, INC.; MB FUEL TRANSPORT I,
11 INC.; ASSOCIATED FUEL OIL CORP.; LIGHT
TRUCKING CORP.; 165 STREET REALTY
CORP.; PARK AVENUE ASSOCIATES, L.L.C.;
12 NEW YORK BEST COFFEE, INC.; JOHN
AHEARN; SYLVIA EZELL; SONIA RIVERA;
13 JORGE SALCEDO; MICHAEL DEVINE; MICHAEL
DEVINE, CPA; GEOFFREY HERSKO; GEOFFREY
14 S. HERSKO, P.C.; SOLOMON BIRNBAUM;
SINGLE SERVE BEVERAGES DISTRIBUTION;
CRAZY CUPS; 26 FLAVORS LLC; AND OFFICE
COFFEE SERVICES LLC,

15 Defendants, and

U.S. Courthouse
Brooklyn, New York

16 TWO RIVERS COFFEE, LLC,

June 10, 2016
2:00 p.m.

17 Nominal Defendant.

18 -----x

19 Transcript of Civil Cause for Oral Argument

20 Before: HONORABLE CAROL B. AMON,
District Court Judge

21 APPEARANCES

22 Attorney for Plaintiff:
23 NELKIN & NELKIN, ESQS.
5417 Chaucer Drive
Houston, Texas 77005
24 BY: JAY P. NELKIN, ESQ.
CAROL NELKIN, ESQ.

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1 Appearances (continuing):

2 Attorneys for Defendants:
CHIESA SHAHINIAN & GIANTOMASI P.C.

3 One Boland Drive

West Orange, New Jersey 07052

4 BY: PAUL H. SCHAFHAUSER, ESQ.

MELISSA WERNICK, ESQ.

5 MEYNER AND LANDIS LLP

6 Gateway Center, Suite 2500

Newark, New Jersey 07102-5311

7 BY: DAVID B. GRANTZ, ESQ.

CATHERINE PASTRIKOS, ESQ.

8 THOMPSON HINE LLP

9 335 Madison Avenue, 12th Floor

New York, New York 10017-4611

10 BY: BRIAN D. WALLER, ESQ.

11 RICHARD A. FINKEL, ESQ. & ASSOCIATES, PLLC

270 Madison Avenue, Suite 1203

12 New York, New York 10116

BY: RICHARD A. FINKEL, ESQ.

13 ROSENBERG FELDMAN SMITH, LLP

14 551 Fifth Avenue, 24th Floor

New York, New York 10176

15 BY: MICHAEL H. SMITH, ESQ.

16 ABRAMS GARFINKEL MARGOLIS BERGSON, LLP

1430 Broadway, 17th Floor

17 New York, New York 10018

BY: ANDREW W. GEFELL, ESQ.

18 GARVEY SCHUBERT BARER, ESQS.

19 100 Wall Street

New York, New York 10005

20 BY: MAURICE W. HELLER, ESQ. (via telephone)

21 Official Court Reporter:

22 MICHELE NARDONE, CSR, RPR, CRR

Phone: 718-613-2601

23 Fax: 718-613-2631

Email: Mishrpr@aol.com

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1 (In open court.)

2 THE CLERK: Schreiber v. Friedman, et al., docket
3 number 15 CV 6861, on for oral argument.

4 THE COURT: Would the parties state their appearances,
5 please. First, for the plaintiff?

6 MR. NELKIN: Good afternoon, your Honor. Jay Nelkin,
7 Nelkin & Nelkin, for the plaintiff.

8 THE COURT: And for the Defendant Friedman?

9 MR. SCHAFHAUSER: Good afternoon. Paul Schafhauser of
10 Chiesa Shahinian & Giantomasi; and with me, Melissa Wernick,
11 for the Friedman Defendants.

12 THE COURT: All right. Do the other counsel just want
13 to state their appearances.

14 MR. GRANTZ: Good afternoon, your Honor. David
15 Grantz, G-R-A-N-T-Z, from the law firm of Meyner and Landis, on
16 behalf of E&J Defendants. I have with my Catherine Pastikos
17 from our firm.

18 MR. GEFELL: Andrew Gefell from the firm Abrams
19 Garfinkel Margolis Bergson, for the Hersko Defendants.

20 MR. SMITH: Michael H. Smith, Rosenberg Feldman Smith,
21 for Michael Devine and Michael Devine, CPA.

22 MR. WALLER: Brian Waller, Thompson Hine LLP, for the
23 oil trucking defendants and John Ahearn.

24 MR. FINKEL: Good afternoon, your Honor. Richard A.
25 Finkel, for Sylvia Ezell, Sonia Rivera, and Jorge Salcedo.

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1 THE COURT: All right.

2 MR. HELLER: Yes, your Honor. On the telephone,
3 Maurice Heller, Garvey Schubert Barer, for the Defendants 26
4 Flavors, Office Coffee Services, Solomon Birnbaum, Crazy Cups,
5 and Single Serve Beverages Distribution.

6 THE COURT: Okay. Can you hear us, Mr. Heller?

7 MR. HELLER: I can. Thank you.

8 THE COURT: All right. Everyone want to be seated,
9 please. The papers that have been filed here are, to put it
10 mildly, extensive, including a reply brief that was filed that,
11 I guess, was about 90-something pages. Of course, the
12 opposition to the original motion was of similar length. There
13 is a lot of, I guess, to put it mildly, he said/she said in
14 most of these papers.

15 Let me hear from counsel for Friedman as to why you
16 think on the current record that the court should order that
17 the complaint be stayed or dismissed and proceed with
18 arbitration, and does it involve resolving factual disputes.

19 MR. SCHAFHAUSER: Thank you, your Honor.

20 I believe that, to answer your Honor's question
21 directly, I believe that the court can, on the current record,
22 find that there are no issues of fact as to the agreement to
23 arbitrate, and I wanted to explain what I mean by that.

24 THE COURT: I don't think it's contested that the
25 operating agreement has agreement to arbitrate. I don't think

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1 anybody is really contesting that.

2 I think the principal position of the plaintiffs here,
3 if I understand it correctly, is that an attempt was made to
4 arbitrate this by the plaintiffs and that defendants' conduct
5 waived any further need to arbitrate. Is that essentially it?

6 MR. NELKIN: That is correct, your Honor.

7 THE COURT: Aren't all the claims in the complaint --
8 wouldn't you agree that all the claims in the complaint would
9 be subject to the arbitration agreement, assuming it was going
10 to be enforced?

11 MR. NELKIN: No, I would not agree with that
12 statement, your Honor.

13 THE COURT: What claims are outside of the arbitration
14 agreement?

15 MR. NELKIN: There are a number of claims involving
16 the what I will call the coffee defendants, that they
17 themselves claim have to do with an entirely different
18 agreement that we contest is even in effect. So a number of
19 those claims.

20 There are a number of claims that the defendants
21 agreed are not subject to arbitration, the claims against
22 Defendants Hersko, or the Hersko Defendants are two, and
23 against the Devine Defendants, they agreed are not subject to
24 arbitration.

25 We would also argue that there are a number of other

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1 claims.

2 THE COURT: I understand that because they are not
3 parties to any arbitration agreement. The argument there is
4 that they are so intertwined they ought to be considered in an
5 arbitration.

6 What claims against the Friedman would you say would
7 not be subject to the arbitration agreement?

8 MR. NELKIN: Well, when you say Mr. Friedman, are you
9 talking about just Mr. Friedman, or are you talking about --

10 THE COURT: Well, the Two Rivers. What claims?

11 MR. NELKIN: There are a number of companies that
12 Mr. Friedman may or may not have interest in, like E&J Funding,
13 that had purported loans to Two Rivers that are subject to
14 separate contracts, loan agreements, specify that they are
15 supposed to take place in -- they have clauses that specify
16 courts in New York. Those are subject to different agreements
17 that are not part of this.

18 THE COURT: So what causes of action would they be?

19 MR. NELKIN: They are ones for usury, they are ones
20 that have to do --

21 THE COURT: Against these E&J?

22 MR. NELKIN: Yes.

23 THE COURT: Is it your contention that all of the
24 allegations against E&J all fall outside the scope of any
25 arbitration agreement?

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1 MR. NELKIN: Yes. We would contend that all claims
2 against all of the other defendants fall outside of the
3 Friedman arbitration agreement, and we would say that the
4 Hersko Defendants and the Devine Defendants agree that while
5 they are seeking to stay those, that those are not arbitrable.
6 So they concede that point, at least for those.

7 They concede, and we agree with them, that certain
8 claims that we have asserted against them, like RICO claims,
9 are not arbitrable because they are not parties and so they say
10 these are not arbitrable.

11 THE COURT: Who agrees that those are not arbitrable?

12 MR. NELKIN: The Hersko Defendants and the Devine
13 Defendants, in their papers they said that.

14 THE COURT: What about claims with regard to Friedman?

15 MR. NELKIN: With regard to Mr. Friedman, Mr. Friedman
16 wears a number of hats. He is a principal in the loan company,
17 he is a principal in some of these other companies that we have
18 claims against for doing things such as false invoicing the
19 company and doing things to hurt the company, either taking
20 money out of the company or stealing money through different
21 schemes, diverting checks and things. We believe that to the
22 extent that those were done on behalf of those other companies
23 by either someone at that company or by Mr. Friedman as a
24 principal of those companies, that those are not arising out of
25 the operating agreement and that they are separate and

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1 independent claims that are not arbitrable.

2 We do have some claims against Mr. Friedman for breach
3 of, let's say, a noncompetition agreement in the operating
4 agreement. That we would agree would be arbitrable, if he
5 hadn't already forfeited the right to arbitrate, but we believe
6 that a number --

7 THE COURT: What claims do you concede would be
8 arbitrable but for the breach of these?

9 MR. NELKIN: The ones where we allege that he engaged
10 in an -- well, the ones that he -- we have a claim for him for
11 breaching the agreement to do -- not compete in the coffee
12 business. We have breaches of fiduciary duty against him
13 within the company for doing different types of things that we
14 feel were inconsistent with his role as a partner. Those types
15 of partnership disputes or breach of a duty as a partner are
16 the ones that we would say arise out of the agreement, to the
17 extent that any of them do.

18 But we believe that most of the claims against
19 Mr. Friedman relate to his role at the other company.

20 THE COURT: All right.

21 (Pause.)

22 THE COURT: All right. I'm sorry. Counsel, do you
23 want to -- you can be seated. Do you want to continue?

24 MR. SCHAFHAUSER: Yes. Thank you, your Honor.

25 Just to address both of your Honor's questions, in

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1 terms of the scope of the agreement, I think your Honor just
2 heard from plaintiff's counsel, most respectfully, that in
3 terms of Mr. Friedman the claims or most of the claims he
4 concedes are within the scope of that agreement. I would
5 actually go one step further and respectfully submit that under
6 the law that we have cited in the brief -- none of which I will
7 repeat because I appreciate that the court has already read
8 it -- but under the law, the scope of the agreement should be
9 broadly construed and the agreement itself is very broadly
10 written and therefore encompasses the claims.

11 By the way, the claims that I heard Mr. -- the
12 plaintiff's counsel talk about were partnership dispute claims,
13 which I believe are the quintessential claims that would arise
14 under the partnership agreement, i.e., the operating agreement.

15 But let me go back, most respectfully, to your Honor's
16 question to me, which, as I remember it, was on this record do
17 I believe that the court has an ability to rule in favor of my
18 clients, I believe, was essentially the thrust of the question.
19 So let me respectfully address that.

20 I was beginning to say that as to the agreement to
21 arbitrate, we believe that's clear. It's a written document.
22 That brings us to -- that brings us to the defense raised by
23 plaintiff, and the defense, of course, as your Honor has
24 articulated it very well, is the defense is waiver. He
25 forfeited it, he waived it, however one wants to couch it,

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1 that, I believe, is the defense. I believe, respectfully, that
2 in and of itself is an arbitrable issue.

3 THE COURT: That's not an argument that you made,
4 however, in your original papers, correct? I don't remember
5 seeing that you argued that the question of waiver itself was
6 arbitrable.

7 MR. SCHAFHAUSER: I did not, you are correct; and
8 there is a good reason why I didn't. But your Honor is
9 correct, I did not argue that in my original papers. The
10 reason I didn't is that the defense of waiver hadn't been
11 raised. The defense of waiver --

12 THE COURT: Your original papers discuss waiver and
13 seek to answer the waiver issue. If it hadn't been raised, why
14 are you talking about it?

15 MR. SCHAFHAUSER: Well, I was anticipating, as best I
16 could, what was forthcoming, but --

17 THE COURT: You have a whole discussion of waiver. In
18 that you could have argued as well that the issue of waiver
19 itself has to be decided by the arbitrator.

20 MR. SCHAFHAUSER: Your Honor, I'm giving you a
21 straight answer. It wasn't in the original brief. But I
22 raised it in response to what I believe was plaintiff's defense
23 of waiver in his opposition.

24 That being said -- that being said, your Honor, the
25 record -- and going back to your Honor's question, what is the

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1 record? Your Honor now has a very ample record, and I
2 respectfully submit that plaintiff, A, bears the burden of
3 proving a defense of waiver; B, under the law of this circuit
4 doubts are to be resolved in favor of arbitrability; and, C,
5 and most importantly, plaintiff has not borne its burden of
6 demonstrating a waiver by my clients.

7 And I can -- I will be brief on the issue. I'm happy
8 to discuss it at as much length as the court wishes, but I
9 appreciate that we have, both sides, have amply submitted our
10 positions in writing already. So, briefly, as to the third
11 point, why my clients under the record have not waived their
12 right to arbitration.

13 Well, even in plaintiff's submission, your Honor, in
14 plaintiff's submission he refers to a Beis Din Beis Yoseph
15 proceeding that was commenced before this case was filed, and
16 that was done in October. Plaintiff also refers to
17 Mr. Friedman's application to a Maysharim in June, which is a
18 second proceeding initiated by Mr. Friedman. Plaintiff also
19 refers to Mr. Friedman --

20 THE COURT: I'm sorry. What application are you
21 speaking of?

22 MR. SCHAFHAUSER: Sure, the application in June by
23 Mr. Friedman was to Maysharim to withdraw the Heter, our --

24 THE COURT: Was that before or after this lawsuit?

25 MR. SCHAFHAUSER: That was six months, approximately,

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1 before the lawsuit. The application was in June. The lawsuit
2 was in, I believe, December 3rd or December 2nd of last year.

3 So there were, just to recap, we have Beis Din Beis
4 Yoseph before this lawsuit. We have --

5 THE COURT: What is that one?

6 MR. SCHAFHAUSER: The Beis Din Beis Yoseph was a
7 rabbinical court that -- whose jurisdiction Mr. Friedman
8 invoked in October. I'm actually going in reverse
9 chronological order, and I probably should have done it the
10 other way, but in October Bais Din --

11 THE COURT: October of?

12 MR. SCHAFHAUSER: Of 2015, in other words, two months
13 before the lawsuit, Mr. Friedman attempted to commence a
14 rabbinical court proceeding.

15 THE COURT: For what?

16 MR. SCHAFHAUSER: For a directive regarding the status
17 of the parties' dispute.

18 THE COURT: The dispute about what?

19 MR. SCHAFHAUSER: A dispute about whether the Heter --
20 whether plaintiff was authorized to proceed in secular court.

21 THE COURT: Why is he going to a different Beth Din to
22 raise that issue? Wouldn't he go back to the one that issued
23 the Heter?

24 MR. SCHAFHAUSER: He in fact did. He in fact did.
25 There is actually -- I'm about to go through four different

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1 tribunals.

2 THE COURT: But there is -- all right. So this one,
3 you are saying, is before the lawsuit. So basically your point
4 is what, he really likes Beth Dins and he will go to them any
5 time he gets a chance, is that it?

6 MR. SCHAFHAUSER: No. My point is not that.

7 My point is that throughout the proceedings in New
8 Jersey it was Mr. Friedman who was arguing in favor of
9 arbitration and plaintiff and his co-minority members who were
10 arguing against arbitration.

11 THE COURT: And the judge basically -- they were
12 arguing against arbitration with respect to the fees and
13 getting a lawyer, and the judge agreed with them that that
14 shouldn't be arbitrated; and so the whole point of what they
15 were raising in New Jersey, the judge in New Jersey agreed with
16 them.

17 MR. SCHAFHAUSER: Well, the judge agreed in part and
18 disagreed, most respectfully, in part, your Honor. The judge
19 agreed that as to the provisional remedy of a \$20,000 payment
20 for the fees, yes, the judge agreed with them; but the judge
21 then said that the remaining claim sought to be asserted
22 against Mr. Friedman would be dismissed and close the case on
23 the same day. So the judge granted the application in part and
24 denied it in part.

25 And the judge would not, most respectfully, your

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1 Honor, have denied any claim or closed the case if the judge
2 had not found that arbitration were warranted. We quote it. I
3 mean, we need not wonder.

4 THE COURT: I have read the entire record before the
5 judge in the New Jersey court, and I'm not sure that I have the
6 exact same reaction that you have been advocating upon the
7 court.

8 MR. SCHAFHAUSER: Very well, your Honor. What I'm
9 simply saying -- and the record is the record. My point is not
10 even to characterize what the judge did. My point, most
11 respectfully, is to characterize what Mr. Friedman did, which
12 goes to the waiver issue, and what Mr. Friedman did is --
13 whether he won or lost in New Jersey, the record will say; but
14 Mr. Friedman was arguing consistently in favor of arbitration,
15 which rebuts the argument that he refused to arbitrate.

16 THE COURT: Well, the argument is not that he refused
17 to arbitrate in the 26 Flavor issue. The argument is that he
18 refused to arbitrate the issues that are now the subject matter
19 of this case when plaintiffs brought that to a Beth Din in --
20 whatever date it was; I don't have the date in front of me
21 right now. That's what he is -- it's not that he has never
22 sought the jurisdiction of Beth Dins, but when they sought to
23 raise these claims that are now the subject matter of this case
24 they didn't -- they didn't agree to a Beth Din on those issues.

25 The fact that they may have agreed to the jurisdiction

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1 of a Beth Din on other issues, what's the relevance of that?

2 MR. SCHAFHAUSER: Well, first of all, your Honor, what
3 plaintiff sought to bring to Maysharim in December 2014 also
4 was not the subject matter of this case, most respectfully.
5 What plaintiff sought, and we point that out in our papers,
6 what plaintiff sought to address at that time was the argument
7 that Mr. Friedman should cause E&J Funding to extend another
8 million dollars, and plaintiff was upset that he didn't agree
9 to extend another million dollars and plaintiff and his
10 co-minority members --

11 THE COURT: Was that specifically stated, because I
12 thought the claim more broadly was partnership improprieties?

13 MR. SCHAFHAUSER: Yes, your Honor. The claim was in
14 fact partnership improprieties. Those were the two words,
15 absolutely. There was no specificity as to what that meant --

16 THE COURT: Okay.

17 MR. SCHAFHAUSER: -- by plaintiff.

18 THE COURT: Now you are telling me that it only could
19 have meant the fact that he didn't spring up for the other
20 million bucks that they wanted from him.

21 MR. SCHAFHAUSER: That's my position, your Honor.

22 THE COURT: Well, that's your interpretation; but the
23 claim itself says partnership improprieties, correct?

24 MR. SCHAFHAUSER: There is no doubt.

25 THE COURT: Which could have covered -- arguably; I

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1 don't know what the phrase covered -- it could have covered a
2 broad array of the issues that plaintiff has raised in this
3 lawsuit.

4 MR. SCHAFHAUSER: The answer is yes, your Honor, the
5 claim was partnership improprieties. I'm not going to deny the
6 obvious. That's what it said. All I'm saying, your Honor, I'm
7 sorry, I didn't mean --

8 THE COURT: No, go ahead.

9 MR. SCHAFHAUSER: I apologize. I have had too much
10 coffee, and I'm excited about today, your Honor. I didn't mean
11 to interrupt your Honor.

12 THE COURT: No. Go ahead. You are not interrupting
13 me.

14 MR. SCHAFHAUSER: Yes, the claim said partnership
15 improprieties, your Honor.

16 I most respectfully submit that the record indicates
17 that it did not relate to these claims; but, whether or not it
18 did or didn't, whether or not it did or didn't, your Honor,
19 Mr. Friedman on the record -- I'm going back to your original
20 question of me -- on this record, I respectfully submit that
21 plaintiff has not borne his burdens of demonstrating that
22 Mr. Friedman intended to relinquish his right to arbitration
23 because what -- when Mr. Friedman learned about this Heter, the
24 Heter dated January 5, 2000, he was not notified about it, and
25 there is no dispute about that. He was not notified until

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1 April.

2 When he learned about it, Mr. Friedman responded --
3 and I'm not going to go back and talk about the New Jersey
4 litigation, which we talked about -- but he then commenced or
5 attempted to commence another proceeding, a Zabla proceeding,
6 which we addressed in the papers. A Zabla proceeding, under
7 orthodox --

8 THE COURT: That's starting a new proceeding before a
9 different Beth Din?

10 MR. SCHAFHAUSER: That is one of the procedures that's
11 recognized under rabbinical law.

12 THE COURT: For what?

13 MR. SCHAFHAUSER: To start a Beth Din proceeding.

14 THE COURT: Right.

15 MR. SCHAFHAUSER: Just so, the Zabla is that one side
16 picks one arbitrator, the other side picks another arbitrator,
17 and the two arbitrators pick the third arbitrator. That's what
18 a Zabla proceeding is.

19 THE COURT: Right.

20 MR. SCHAFHAUSER: He commenced that or attempted to
21 commence that in May of 2015 -- again, many months before this
22 lawsuit was filed -- and notified plaintiff and the other
23 minority members. They refused to participate in the Zabla.
24 So to recap, they refused to participate in the Zabla. They
25 were served with -- plaintiff admits having been served with

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1 three, if not four, summonses by Beis Din Beis Yoseph and
2 refused to participate in that.

3 THE COURT: Well, if you have got one going, what
4 happens here with these types of proceedings? One person has
5 already instituted a proceeding and has gotten from that
6 proceeding this Heter. What permits the person to ignore that
7 and go start another Beth Dins and say, look, I'm trying to
8 arbitrate. Once a Beth Din has been established, can someone
9 go to another one and start issuing summonses?

10 It would be the equivalent if you had a case going
11 here in the Eastern District and you weren't happy with how it
12 was going, then you initiate the identical case in the Southern
13 District and say you didn't show up to the Southern District
14 case.

15 MR. SCHAFHAUSER: Well, the proceeding before -- and
16 this is why it is, of course, a little convoluted -- the
17 proceeding before Maysharim that was commenced in June was a
18 limited proceeding; and that's the answer to your Honor's
19 question. The proceeding before Maysharim was to rescind the
20 Heter. Yes or no, rescind the Heter. That was the issue
21 presented to Maysharim. So that's what Maysharim was asked to
22 do in June.

23 And then there was a hearing that your Honor has seen
24 referenced in the papers, and Maysharim in September of 2015
25 issued a directive regarding that issue that your Honor has

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1 seen. But the proceeding before Maysharim was a limited
2 proceeding, not, I respectfully submit, intended to address the
3 full panoply of disputes between the parties. That's why
4 Mr. Friedman was trying to commence the Zabla. But plaintiff
5 did not participate in the Zabla.

6 So now let me go to the Maysharim proceeding, your
7 Honor.

8 THE COURT: But plaintiff now has this Heter, which
9 allows him to go to a secular court on all of the issues that
10 he wants to raise, because I guess that entity determined that
11 Mr. Friedman hadn't complied with the procedures and then
12 allowed plaintiff to come to court. So plaintiff now has this
13 ability to come to court.

14 What means would that circumstance, what requires him
15 to then submit to another arbitration proceeding that
16 Mr. Friedman initiates on the same matter? That doesn't sound
17 right.

18 MR. SCHAFHAUSER: Again, I don't believe it's the same
19 matter.

20 But to go to the Heter your Honor, the Heter was
21 issued on January 5, 2015, almost a year before this case was
22 commenced. Now, plaintiff claims reliance on the Heter.
23 Plaintiff claims that the Heter authorized, as your Honor just
24 put it, authorized him to go to secular court.

25 If plaintiff relied on the Heter, then why didn't he

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1 ever confirm the Heter as an award for 11 months before he
2 filed this lawsuit? I would respectfully ask plaintiff that
3 question.

4 Secondly, your Honor --

5 THE COURT: Is there some requirement that he confirm
6 it before he come to court?

7 MR. SCHAFHAUSER: Well, I believe there is a -- well,
8 I believe it's an indicia of whether he actually relied on the
9 Heter before.

10 THE COURT: The day he got it could he have come to
11 court, without confirming it?

12 MR. SCHAFHAUSER: According to plaintiff, according to
13 plaintiff, the answer is yes; and plaintiff says that in his
14 papers. And that's my point, most respectfully, your Honor.

15 Most respectfully, a plaintiff says he could have gone
16 to court on January 6 of 2015 if the Heter was issued on
17 January 5 of 2015.

18 THE COURT: Do you disagree with that proposition?

19 MR. SCHAFHAUSER: I disagree because I believe that
20 the Heter was improperly issued.

21 THE COURT: But not that it had to be -- something
22 else had to happen?

23 MR. SCHAFHAUSER: Well, I believe, your Honor, that
24 plaintiff, if he was truly relying on the Heter, under the
25 federal arbitration act he could have moved to confirm that

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1 Heter for the entire year following that. He never did.

2 THE COURT: Did he have to?

3 MR. SCHAFHAUSER: He -- there is no --

4 THE COURT: He's got an order from a rabbinical court
5 that says you can go to court. Your position is -- or one of
6 the things you argue about, well, he didn't go to court for a
7 long time and he says he could have gone the next day. My
8 question to you is: Could he have gone the next day, or are
9 you challenging that because you are talking about he could
10 have confirmed something. Did he have to confirm something to
11 do that?

12 MR. SCHAFHAUSER: Well, the direct answer to your
13 question, your Honor, is if he is saying he relied on it as a
14 final award, then yes. Then it should have been an enforceable
15 final award.

16 THE COURT: Why wasn't it --

17 MR. SCHAFHAUSER: Plaintiff -- I'm sorry. Go ahead.

18 THE COURT: Why was it not a final, enforceable award?

19 MR. SCHAFHAUSER: It wasn't a final, enforceable award
20 for -- well, the facts bear out that it wasn't a final
21 enforceable award. Why wasn't it a final enforceable award?
22 Because when Mr. Friedman made an application to Maysharim,
23 Maysharim itself held, on September 25, i.e., nine months after
24 the Heter was issued, Maysharim itself held we will withdraw
25 the Heter if Mr. Friedman does items one and two and we will

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1 get to what those are, but Maysharim itself recognized that it
2 was not a final award and was going to withdraw the Heter and
3 in fact then issued a subsequent ruling indeed withdrawing the
4 Heter; and, by the way, nowhere does plaintiff argue, your
5 Honor, that Maysharim on December -- I'm sorry -- on
6 September 25, 2015 didn't have the authority to do what it did.
7 Nowhere does plaintiff take issue with that award. In fact,
8 plaintiff is seeking to confirm that award, thereby
9 demonstrating that the Heter itself was not final.

10 But I have another reason, your Honor, why I
11 respectfully submit that the Heter was not final. That is that
12 plaintiff himself conceded that the Heter was not -- and I will
13 use the exact word -- permanent. In October 2015 -- by the
14 way, a date that plaintiff now argues Maysharim had no
15 jurisdiction -- but back then, in October 2015, plaintiff wrote
16 the court on October 15 of last year, wrote Maysharim and asked
17 Maysharim to make the Heter permanent. That's the word, make
18 it permanent. And plaintiff asked for other forms of relief.

19 But to your question as to why was the Heter not
20 final, well, plaintiff recognized that it was not, quote,
21 permanent because it asked Maysharim to make it permanent; and
22 Maysharim tellingly did not make it permanent, your Honor,
23 never made the Heter permanent.

24 THE COURT: What authority does the court have, having
25 said that you can go to court earlier and assuming he could go

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1 to court, how can a rabbinical court, after someone has come to
2 court, then issue an order saying that you can no longer go to
3 court, and what effect does that have? In other words, a court
4 proceeding has been initiated assuming -- assume that it's
5 legitimately initiated pursuant to the first Heter. Is it your
6 argument that even if all of that had been -- pardon the
7 phrase -- kosher, that nonetheless the rabbinical court can rip
8 the jurisdiction away from the district court and by coming up
9 with a subsequent ruling?

10 MR. SCHAFHAUSER: My argument, your Honor, is -- there
11 is a number of pieces to your question. So I'm struggling to
12 give a yes-or-no question -- yes-or-no answer to your question,
13 your Honor.

14 But my argument is that the Heter itself, as I said a
15 moment ago, was not final; and the Heter itself says, on the
16 face of the document, back in January of 2015, that the
17 Defendant Friedman -- I'm sorry -- that the plaintiff could go
18 to court against Defendant Friedman so long as Mr. Friedman did
19 not submit to this jurisdiction of a rabbinical court, not
20 necessarily Maysharim but a rabbinical court. That's what the
21 Heter itself said.

22 So on its face, your Honor, it was only valid and
23 enforceable so long as Mr. Friedman did not submit to the
24 jurisdiction of a rabbinical court. As I have mentioned to
25 your Honor, I respectfully submit that he submitted to the

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1 jurisdiction of at least three rabbinical courts or attempted
2 to do so, but plaintiff didn't cooperate, at least three times
3 before the lawsuit was filed.

4 So the Heter on its face was no longer enforceable,
5 but, again, we have plaintiff's admission in writing to
6 Maysharim asking Maysharim to make the Heter permanent, and the
7 Heter was never made permanent. So to answer your Honor's
8 question in this way, I do not believe that a plaintiff can
9 ignore the conditional nature of a Heter, admit that Maysharim
10 retains jurisdiction, be told by Mr. Friedman, by the way --
11 this is also in the papers -- Mr. Friedman told plaintiff and
12 his father that he would comply with Maysharim's directives.

13 THE COURT: But he didn't.

14 MR. SCHAFHAUSER: And then run to court.

15 THE COURT: But he didn't comply with their
16 directives. When did he -- so he says, okay, I'm going to
17 comply with your directives, but he doesn't do it.

18 MR. SCHAFHAUSER: Well, he did before. I mean the
19 Maysharim ultimately found that Mr. Friedman did comply, most
20 respectfully, with its directives.

21 Again, the question, your Honor, is, A, did
22 Mr. Friedman refuse to arbitrate; B, was plaintiff prejudiced
23 and can plaintiff show prejudice; C, did plaintiff reasonably
24 rely on an alleged refusal to arbitrate; and I respectfully
25 submit that the answer to all three of those questions is no,

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1 based on the record before your Honor, based on the record that
2 is really not even in dispute by plaintiff at this point.

3 I mean plaintiff's submissions to Maysharim are in
4 plaintiff's own exhibits. So those can't be disputed, that
5 plaintiff said, please make the Heter permanent, and the Heter
6 was never made permanent. Plaintiff also can't dispute that it
7 was never enforced as final.

8 Your Honor understands, I believe, my position; and,
9 again, my position, to answer -- circle back to the original
10 question is on this record plaintiff has not borne its very
11 heavy burden, most respectfully, to demonstrate a waiver, and a
12 waiver, as your Honor is well aware, is not likely to be
13 inferred under the Federal Arbitration Act and Mr. Friedman,
14 contrary to refusing to arbitrate, in fact, repeatedly
15 attempted to do just that before the case was filed.

16 THE COURT: Well, I mean the argument can be made that
17 he attempted to do it on his own terms.

18 MR. SCHAFHAUSER: In fairness, I believe that is
19 plaintiff's argument. There is no doubt that is plaintiff's
20 argument.

21 But, to rebut that argument, your Honor, I would note
22 the following. Number one, Mr. Friedman went back to
23 Maysharim, which is the rabbinical court that plaintiff himself
24 chose; and that rabbinical court ultimately found that
25 Mr. Friedman had complied with its requirements and withdrew

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1 the Heter.

2 THE COURT: How did that -- what were the
3 circumstances leading to the January 28, 2016 decision? Was
4 there new information provided to the Maysharim? How did they
5 come to say that you really didn't meet the requirements that
6 we had earlier imposed in September? How did that happen? How
7 did they know anything about it? I mean what happened?

8 MR. SCHAFHAUSER: Mr. Friedman testified to this in
9 his deposition, but essentially what Mr. Friedman testified to,
10 your Honor, is that he posted a 250,000 -- the sum of 250,000
11 was posted, and Mr. Friedman executed an arbitration agreement
12 with a rabbinical court and that was submitted to Maysharim and
13 that ruling was thus rendered on that basis. That's what
14 happened.

15 THE COURT: You mean he came up with the \$250,000 to
16 that Maysharim, or he gave it to another one?

17 MR. SCHAFHAUSER: The sum of \$250,000 was posted. It
18 was placed in a, I believe, in another rabbinical court, which
19 Maysharim recognized as sufficient for purposes of its
20 directive.

21 THE COURT: But it wasn't put with Maysharim, which is
22 where it was supposed to be put, right, originally?

23 MR. SCHAFHAUSER: I don't believe that Maysharim
24 required it to be put with Maysharim. I believe -- I have to
25 go back to the directive itself, but I believe it was that he

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1 simply posted --

2 THE COURT: No. I think it was that there were three
3 Beth Dins that he could choose from, and then it says the sum
4 of \$250,000 by the Beth Din Chosin.

5 MR. SCHAFHAUSER: Right. So it's not the Maysharim.

6 THE COURT: So he never chose any of those three to
7 resolve the dispute, correct?

8 MR. SCHAFHAUSER: He chose another Beth Din, correct.

9 THE COURT: Which wasn't any one of the three named in
10 the September 25 order.

11 MR. SCHAFHAUSER: Well, I believe it's a different
12 Beth Din.

13 THE COURT: Where is the \$250,000 escrowed now? Where
14 is it?

15 MR. SCHAFHAUSER: The \$250,000 is still with that, as
16 Mr. Friedman testified, still there.

17 THE COURT: Still where?

18 MR. SCHAFHAUSER: It's with the -- I don't have the
19 document and his deposition transcript in front of me, but it's
20 with the same rabbinical court.

21 THE COURT: Is it with the BDBY, Beis Din Beis Yoseph?
22 Is it the one that excommunicated the plaintiff?

23 MR. SCHAFHAUSER: It's either the Beth Din or an
24 affiliated rabbinical court.

25 THE COURT: I think there was one that determined that

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1 the plaintiff had been excommunicated. Isn't that the Yoseph
2 one?

3 MR. NELKIN: Your Honor, I can answer that, if you
4 would like.

5 MR. SCHAFHAUSER: Go ahead.

6 THE COURT: Isn't that the Beis Din Yoseph?

7 MR. NELKIN: No.

8 MR. SCHAFHAUSER: I'm actually referring to the
9 transcript, your Honor, to give your Honor a very specific
10 answer. In the transcript, at page 196 of Mr. Friedman's
11 deposition, refers to the Bais Din Tzedek Umishpot, which is in
12 Brooklyn.

13 MR. NELKIN: That is incorrect, your Honor. It's with
14 the Mechon L'Hoyroa. That's what he testified to. Mechon
15 L'Hoyroa is the one that his partner Joseph Friedman
16 contributed at least \$695,000 to; and Mr. Friedman testified
17 that he himself did not give the money to Mechon L'Hoyroa, this
18 Joseph Friedman did. He wasn't sure exactly. He couldn't
19 remember how. He thought Joseph had done it on his behalf.

20 THE COURT: That's where the money is?

21 MR. NELKIN: Yes.

22 THE COURT: But that's not this --

23 MR. NELKIN: It's not any of the ones that were
24 specified.

25 THE COURT: I know it's not any of the ones that were

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1 specified, but I thought there was one called Beis Din Beis
2 Yoseph. Is it the one that excommunicated your clients? Which
3 one did that?

4 MR. NELKIN: That's Beis Din Beis Yoseph, but there is
5 overlap between some of the Beth Dins.

6 THE COURT: But the money was put in yet a third or
7 fourth Beth Din?

8 MR. NELKIN: It was put in one that was specifically
9 excluded by Maysharim, after hearing the proof and evidentiary
10 submissions.

11 THE COURT: Excluded when, September 25, 2015?

12 MR. NELKIN: Yes. Mr. Friedman had requested that
13 that one be one of the Beth Dins that was allowed.

14 THE COURT: On January 28 at 2016, apparently all is
15 forgiven?

16 MR. NELKIN: They said that he had essentially
17 fulfilled it by giving it to a different Beth Din, and what
18 they said is he gave it to him but, in fact, his testimony is
19 that he did not. So they were under the misimpression that he
20 had actually contributed it when he did not.

21 THE COURT: Who contributed it.

22 MR. NELKIN: Someone named Joseph Friedman.

23 THE COURT: Put the \$250,000 in? Is there money
24 escrowed somewhere now?

25 MR. NELKIN: We don't know that because they never

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1 submitted any proof. They refused to produce any records on
2 that point. We believe that that was a very suspicious
3 transaction, to the extent that it took place; but we have seen
4 no evidence of an escrow, we have seen no evidence of a
5 contribution by Mr. Friedman, we have seen none of the
6 documents related to anything.

7 The only thing that we know is that Mr. Friedman
8 testified that he himself did not give the money to Mechon
9 L'Hoyroa, and he couldn't remember the circumstance as to how
10 it occurred or what transpired.

11 THE COURT: You all have had discovery. There has
12 been some discovery.

13 What is the information, what was presented to the
14 Maysharim that led to this January 28, 2016 award? Counsel for
15 Mr. Friedman, do you know the answer to that?

16 MR. SCHAFHAUSER: I know what Mr. Friedman testified
17 to.

18 THE COURT: I'm sorry. Just refresh my recollection.
19 He testified to what about that?

20 MR. SCHAFHAUSER: He testified that the sum of
21 \$250,000 was deposited on his behalf with this rabbinical court
22 and that he signed -- it's actually an exhibit to what
23 Maysharim ultimately entered on January 28. The second page, I
24 believe, is what Mr. Friedman executed.

25 THE COURT: What exhibit is that?

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1 MR. SCHAFHAUSER: The exhibit --

2 THE COURT: Is this something that the Maysharim
3 provided?

4 MR. SCHAFHAUSER: No, no. It's an agreement to
5 arbitrate that Mr. Friedman executed and that was submitted to
6 Maysharim and on the basis of the fact that the sum of \$250,000
7 was deposited.

8 THE COURT: Does he say and -- is there some evidence
9 that backs up that he put this money in escrow some where that
10 was given to the Maysharim?

11 MR. SCHAFHAUSER: He testified to it, your Honor. He
12 testified that it was.

13 THE COURT: So he testified that I gave this -- that I
14 showed them that I had commenced a Beth Din with this other
15 group and I also gave him evidence that I had escrowed this
16 money? Is that what he said?

17 MR. SCHAFHAUSER: That's correct, and Maysharim found
18 that evidence satisfactory and rendered the ruling that it did.
19 That's correct.

20 THE COURT: Do we have any -- is there in the record a
21 document that he says this is what I gave them to show the
22 money was there?

23 MR. SCHAFHAUSER: I don't believe that was submitted
24 as part of this. What was submitted was Mr. Friedman's
25 deposition testimony surrounding those events as well as

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1 Maysharim's ruling.

2 THE COURT: Okay.

3 MR. SCHAFHAUSER: Again, Maysharim was the one, was
4 the rabbinical court that plaintiff chose originally and
5 Maysharim, i.e., plaintiff's original rabbinical court, the
6 forum of its choosing, found that Mr. Friedman had complied
7 with its conditions.

8 But I'm moving afield. So let me go back to your
9 Honor's original question, because we are now talking about
10 January of this year. But I wanted to focus again to the
11 prelitigation events.

12 Your Honor was asking me about the prelitigation
13 events, and the prelitigation events are, based on the record,
14 that plaintiff went to Maysharim, plaintiff was aware that
15 Maysharim issued a Heter that said if Mr. Friedman submits to a
16 rabbinical court's jurisdiction the Heter is no longer in
17 effect, plaintiff doesn't confirm the Heter, plaintiff doesn't
18 act in accordance with the Heter, plaintiff sits and waits,
19 plaintiff watches Mr. Friedman commence a proceeding to
20 withdraw the Heter, plaintiff represents to Maysharim --

21 THE COURT: When was the proceeding to withdraw the
22 Heter?

23 MR. SCHAFHAUSER: The proceeding to withdraw the Heter
24 was commenced in June of 2015, again, five to six months before
25 the lawsuit.

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1 THE COURT: Okay, but he doesn't go to court then.

2 MR. SCHAFHAUSER: He does not go to court then either.

3 THE COURT: The September order comes out. So he
4 waits for the September order, and then one of the conditions
5 of the September order is that \$250,000 goes to one of these
6 Beth Dins. By December 19 that hasn't happened, so he goes to
7 court.

8 MR. SCHAFHAUSER: That is plaintiff's position.

9 THE COURT: I'm sorry, September 2nd -- December 2nd.

10 MR. SCHAFHAUSER: I understood what your Honor was
11 saying, December 2nd. That is plaintiff's position.

12 But this is an interesting fact. Plaintiff himself
13 was troubled by the fact that there was no deadline in
14 Maysharim's September 25 directive, and so plaintiff, a month
15 after that directive was issued, went back to Maysharim another
16 time.

17 THE COURT: Okay.

18 MR. SCHAFHAUSER: Another time and said, Maysharim,
19 would you please issue a date certain by which Mr. Friedman
20 needs to comply with the directives because it's unclear as to
21 when those directives have to be satisfied. Maysharim never
22 issued a date certain.

23 So on December 2nd, when plaintiff chose to come to
24 this court, at that moment, under Maysharim's own directives,
25 there was no date certain; and plaintiff knew it, and plaintiff

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1 had applied to get a date certain and was denied that. So I
2 respectfully submit that's yet another fact, which, by the way,
3 cannot be disputed because it's in plaintiff's own submission.

4 There cannot be a reasonable reliance on an award
5 which is an interlocutory award. The award on its face says,
6 your Honor, that if Mr. Friedman satisfies certain conditions,
7 the Heter will be removed. Well, the moment that directive was
8 issued, plaintiff, most respectfully, your Honor, was on notice
9 that the Heter could be removed if Mr. Friedman satisfied the
10 conditions. So as of that moment, plaintiff couldn't rely on
11 that directive.

12 Secondly, because it was an interim award, it wasn't a
13 final award; and, thus, it cannot be confirmed under the
14 Federal Arbitration Act either. As plaintiff himself admitted
15 when he asked for the award to be -- for the Heter to be deemed
16 permanent and it was not.

17 So plaintiff came to court, in short, based on a Heter
18 that was procedurally flawed, a Heter on which he did not rely,
19 a Heter on which he did not confirm, a directive of Maysharim
20 which plaintiff admits was not permanent, a directive that was
21 subject to change; and plaintiff asked Maysharim to change the
22 directive, and, as well, Mr. Friedman's efforts to commence
23 other arbitration proceedings. Plaintiff can quibble as to
24 whether the arbitration proceedings were the correct Beth Din
25 or incorrect Beth Din, whether the rabbinical court, your

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1 Honor, was the right one or the wrong one.

2 But the fact is that Mr. Friedman attempted to
3 commence arbitration proceedings before this lawsuit was filed.
4 He was not refusing to participate in arbitration, as plaintiff
5 alleges; and, therefore, on this record, based on the
6 documentary evidence, your Honor, I respectfully submit that
7 plaintiff cannot possibly demonstrate his burden of proving
8 waiver under the law in this circuit, your Honor.

9 THE COURT: Is that true, even if the court were to
10 find that his efforts to his -- purported other efforts to
11 arbitrate were not genuine, is it still true that -- your
12 argument that because he had a Heter that was not final or an
13 interim award that he still couldn't legitimately come to
14 court?

15 MR. SCHAFHAUSER: Yes. The answer is if the court
16 were to discard the Beis Din Beis Yoseph proceeding and if the
17 court were to disregard the Zabla proceeding -- although I
18 respectfully submit we shouldn't -- but if the court were to
19 disregard those proceedings and to focus solely on the Heter by
20 Maysharim and the September 25 directive by Maysharim, on the
21 record of those two items, there cannot possibly have been a
22 waiver because Mr. Friedman, putting aside what he did with the
23 Zabla and what he did with Beis Din Beis Yoseph, was in
24 Maysharim asking for the Heter to be removed but the Heter
25 itself said that if he submitted to a rabbinical court

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1 plaintiff could not go to court any longer.

2 Last point on the Heter, your Honor -- and I want to,
3 by the way, thank your Honor for your patience in hearing these
4 arguments; they are obviously very significant to my client --
5 but the last point on the Heter, while we are talking about
6 rabbinical court proceedings, it must be noted that Maysharim
7 issued a single summons, contrary to its own procedure, in
8 December of 2014, and that summons said that if the defendant
9 failed to comply then the rabbinical court Maysharim would
10 entertain an application for the issuance of sanctions,
11 including a Heter.

12 Nowhere in the papers submitted by your Honor --
13 submitted by plaintiff to your Honor has plaintiff explained
14 how it came to be that between the issuance of a summons and
15 the issuance of a Heter, how Maysharim did that without a
16 communication by the plaintiff, without notice to Mr. Friedman,
17 without notice of an application for a sanction being
18 submitted. Nowhere in the papers is there any explanation on
19 that significant point. So the initial proceeding, your Honor,
20 most respectfully --

21 THE COURT: Well, I think it's like default and
22 default judgment. I mean he doesn't respond. What has to
23 be -- there is certain relief that's being requested. If he
24 doesn't respond, what is it that -- what have you shown as to
25 what is required to be done here?

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1 MR. SCHAFHAUSER: Well, what I have shown is
2 Maysharim's own document, your Honor, most respectfully. That
3 document talks about an application; but, even under your
4 Honor's analogy of a default and a default judgment, one
5 actually has to apply for the entry of a final judgment by
6 default. And there is no record here of how, when, where, and
7 on what notice plaintiff applied for the entry of a Heter. And
8 the Heter was curiously issued approximately two and a half
9 weeks after the proceeding was commenced.

10 So within a two-week period we went from the first
11 summons and the only summons to the entry of, as your Honor
12 puts it, a final judgment by default. It's on the basis of
13 that so-called final judgment of default that plaintiff
14 purports to have relied for the ensuing 11 months, although it
15 took no action to enforce that judgment.

16 THE COURT: Wasn't there a hearing that he failed to
17 appear before, at a hearing?

18 MR. SCHAFHAUSER: Well, there is no record of whether
19 there was a hearing or not. There is no record before this
20 court of any hearing or any notice to Mr. Friedman of a
21 hearing. The only thing that we have, your Honor --

22 THE COURT: Well, the summons was --

23 MR. SCHAFHAUSER: -- is the original summons.

24 THE COURT: The summons is to show up though, right?

25 MR. SCHAFHAUSER: Yes, the summons, yes, we have the

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1 summons. We have one summons.

2 THE COURT: He, first of all, claimed that he didn't
3 learn about that, but then he admitted he did know about it.

4 MR. SCHAFHAUSER: No. What he claims, your Honor --

5 THE COURT: Was that he didn't receive it or something
6 at first.

7 MR. SCHAFHAUSER: -- is that he learned about one and
8 only one summons, but he understood that an additional two
9 summonses would be issued. By the way --

10 THE COURT: Didn't he first claim he didn't get any
11 notice of it until much later, and then at his deposition he
12 admitted he got it earlier? I thought there was an
13 inconsistency there.

14 MR. SCHAFHAUSER: Well, I think he testified -- he
15 testified in his deposition, your Honor, that, very
16 consistently, that he knew of one summons.

17 THE COURT: Well, the timing of when he knew of the
18 summons was what was inconsistent.

19 MR. SCHAFHAUSER: Well, he wasn't aware of two other
20 summonses, and what he also testified was that he did not learn
21 about the Heter until -- the Heter that was issued until a Beth
22 Din proceeding in April of 2015. There was no rebuttal to
23 that. So even when the Heter was issued, plaintiff never told
24 Mr. Friedman about the issuance of the Heter. There is no
25 declaration by Mr. Schreiber to the contrary.

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1 So, on those facts, your Honor, I respectfully submit
2 that the scope of the agreement is clear, it's broad, under the
3 law it must be construed broadly; and on this record plaintiff,
4 who bears a very heavy burden under the law, has failed to
5 demonstrate a waiver. The court then should, most
6 respectfully, grant my client's application, dismiss the
7 complaint, and refer the matter to a Beth Din arbitration.

8 (Continued on the next page.)

9 o o o

10 Certified to be a true and accurate transcript.

11 /s/ Michele Nardone

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1 (In open court.)

2 THE COURT: Where would it go? Assuming that I grant
3 you the relief that you want that it goes to a Beth Din where
4 does it go?

5 MR. SCHAFHAUSER: It would go to one of the Beth Dins
6 properly designated under the Two Rivers operating agreement.
7 And the Two Rivers operating agreement says a, "Beth Din," I
8 believe, "within New York or New Jersey."

9 THE COURT: So that could be anyone.

10 Are you saying to goes back to the one that
11 excommunicated Mr. Schreiber?

12 I mean, would all of this would all of this litigation
13 go away if the plaintiff and Mr. Friedman now could agree on a
14 Beth Din to resolve all of this?

15 MR. SCHAFHAUSER: Yes. I submit that it would go
16 away.

17 And, your Honor?

18 THE COURT: Let me ask plaintiff's counsel.

19 Assuming that you could come up with a Beth Din, I
20 don't know, we have gone to a Beth Din of America or someone,
21 where everybody agreed to who the arbitrators should be would
22 that solve this lawsuit?

23 MR. NELKIN: Well, we don't believe so, your Honor,
24 for a couple of the reasons, not the least which a number of
25 defendants were not prepared to go to a Beth Din.

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1 THE COURT: Would it deal with the majority of the
2 case against Mr. Friedman?

3 MR. NELKIN: Well, your Honor, I think that he parties
4 could always agree to go and have an arbitrator take care of a
5 claim or mediation. That's part of just any litigation. I
6 think that in -- we certainly would like to respond to a lot of
7 the things.

8 THE COURT: I'm going to give you the chance.

9 MR. NELKIN: But, basically, we believe that the law
10 is clear on this one that, for a variety of reasons, that we'd
11 like to respond to, that Beth Din proceeding is no longer
12 appropriate in this matter.

13 Now, that being said, assuming that the parties
14 could reach an agreement then that, you know, that any
15 lawsuit --

16 THE COURT: Well, is that just not possible in your
17 view?

18 MR. NELKIN: We think that it's very unlikely in light
19 of a number of reasons, not the least of which is
20 Mr. Friedman's efforts, we believe, to corrupt the Beth Din
21 process and the lack of transparency in the Beth Din process.

22 THE COURT: In all Beth Din processes?

23 MR. NELKIN: Unfortunately, from what we've seen, it's
24 very troubling, your Honor.

25 THE COURT: So, this Beth Din of America, is that

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1 something that's --

2 MR. NELKIN: The Beth Din America --

3 THE COURT: -- reputable.

4 MR. NELKIN: The Beth Din of America has refused to go
5 forward with the proceedings in the 26 Flavors case because of
6 Mr. Friedman's actions before them.

7 So they, themselves, said they wouldn't go forward
8 because of Mr. Friedman's actions in that case. And that's in
9 our papers but I can explain that. But, basically,
10 Mr. Friedman took the position that Two Rivers could not have
11 counsel and could not be represented in that matter, and they
12 felt that it was in denial of due process, and as long as he
13 continued to insist on that position.

14 He also took the position that they couldn't have
15 jurisdiction and he refused to agree to jurisdiction before the
16 Beth Din of America for all of these issues.

17 And so, between the fact that Mr. Friedman refused to
18 submit those issues to the Beth Din of America, and the fact
19 that he refused to allow Two Rivers to have counsel just for
20 the little matter that they were trying to deal with, the
21 Beth Din of America has notified the parties that they will not
22 proceed.

23 THE COURT: Well, okay. You want to be heard in
24 response to counsel then?

25 MR. NELKIN: I would, your Honor.

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1 THE COURT: Okay. You can be seated, Counsel.

2 MR. SCHAFHAUSER: I was going to finish up.

3 THE COURT: I thought you had.

4 MR. SCHAFHAUSER: Very well.

5 THE COURT: It's hour an 20 minutes.

6 MR. SCHAFHAUSER: Thank you, your Honor. I will
7 respond.

8 THE COURT: It's been at least an hour. Maybe I was a
9 little late coming onto the bench.

10 Counsel.

11 MR. NELKIN: Your Honor, I think at the very outset, I
12 need to correct the timeline on a number of fronts. And I also
13 need to correct certain terms that I think Mr. Schafhauser was
14 using either incorrectly or interchangeably.

15 There is something called an hazmana or a summons,
16 that is, a request to arbitrate. There is also something
17 called a heter, that is when someone refuses to respond to a
18 summons.

19 I think those two types of documents are very
20 important to distinguish. And I think it's very important to
21 understand the timeline in this case. I would also note before
22 I get to the timeline that at the hearing before in March 8th,
23 I believe, in response to the premotion conference submissions
24 where we raised things like the Lane case and the issues of
25 waiver, your Honor instructed the defendants to make sure that

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1 their papers addressed their failure to go forward.

2 So I find it somewhat difficult to understand why they
3 wouldn't address that in their opening papers and would only
4 raise that in their reply papers.

5 THE COURT: Only raise what in their reply papers?

6 MR. NELKIN: The issues of waiver.

7 THE COURT: They raised the issue of waiver in
8 their initial papers. What they didn't raise was an argument
9 that waiver itself is arbitrable, that wasn't in the initial
10 papers. They addressed the issue of waiver in their original
11 papers.

12 MR. NELKIN: Be that as it may, we have issues with
13 what they put into their reply on that point. The timeline is
14 as follows.

15 The timeline is in December, I believe, 16, 2014, the
16 plaintiffs had a summons sent from Maysharim to Mr. Friedman.
17 Mr. Friedman, although he told this court in his opening papers
18 that he never received it. And he told the Middlesex court
19 that he never received it. Admitted in his deposition that he
20 had received it.

21 He also admitted before Beth Din Maysharim, when they
22 quizzed him on it at length, and he told them that he ignored
23 it. He testified in his deposition that he ignored to; that he
24 sent it to his lawyer, Herstow, and that he sent it to someone
25 else an Rabbi Gruber but he ignored it.

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1 A heter was issued as a result of that. Your Honor is
2 correct, it is like a default judgment. If you don't show up,
3 they issue --

4 THE COURT: Is there some requirement that they issue
5 three summonses?

6 MR. NELKIN: Absolutely not. I mean, you can go back
7 to the Talmud, and the Talmud says you have to respond to the
8 first one. But you can also look at any of their documents
9 that they submitted. The Laymen's Guide where they have these
10 procedures to Beth Din of America. The summonses that had been
11 submitted from the different Beth Dins. There is no place on
12 any of those where they say you have to -- you can ignore the
13 first two. In fact, in Beth Din Maysharim they actually talk
14 to Mr. Friedman about that.

15 THE COURT: What record is that of their talking to
16 him? I mean, is there some record of some proceeding?

17 MR. NELKIN: There is, in fact, a transcript of that
18 that exists.

19 THE COURT: But it's not in the record here.

20 MR. NELKIN: Well, it is, there's an affidavit where
21 people have testified about what was said by Mr. Friedman at
22 that.

23 THE COURT: When was this that they were talking to
24 Mr. Friedman?

25 MR. NELKIN: I will get to that in the timeline.

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1 THE COURT: Okay.

2 MR. NELKIN: So, Mr. Friedman, notwithstanding the
3 fact they told this court that he didn't get the heter, the
4 summons, and notwithstanding the fact they told the Middlesex
5 court that he didn't get the summons, got the summons in
6 December and he ignored it. He ignored it for a very long
7 time, whether or not he knew about the heter or not. We
8 believe he did know about the heter since the heter was sent to
9 him. But we also believe he knew it about since the day after
10 the heter was issued.

11 THE COURT: Who sent it to him?

12 MR. NELKIN: The Beth Din Maysharim.

13 THE COURT: Now, how do we know that?

14 MR. NELKIN: I believe that there is evidence of that
15 that's in the record, your Honor.

16 But regardless of that point, he knew about the
17 summons and the request to arbitrate, and he simply he chose to
18 ignore it. There's testimony in the record about he told
19 people about how he dealt with Beth Dins. He would often
20 ignore them despite admitting that he got it.

21 At some point, he learned about the heter. Again,
22 he's told different stories about when he learned about it. I
23 think he told in the record the different points where he said
24 he first learned about it in the Middlesex case. He's now
25 admitted that he learned about it at least in April at the

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1 hearing before the Beth Din of America and that's certainly
2 true because --

3 THE COURT: April of what year?

4 MR. NELKIN: April of 2015.

5 Because I circulated that, I was at that hearing, and
6 circulated it in the room.

7 THE COURT: He knew about it then. That's when the
8 Middlesex, New Jersey case was going on.

9 MR. NELKIN: That's the Beth Din of America there's a
10 hearing of that and he submitted a transcript and he refers to
11 the record in his reply and admits that he now got it at least
12 at that date in April. He then ignored that. He didn't do
13 anything about it.

14 THE COURT: At the heter in April?

15 MR. NELKIN: Yes. He certainly got a copy of it in
16 April and knew about it in April when he attended the Beth Din
17 of America proceeding in the 26 Flavors matter. He ignored to.
18 He ignored it until it started going bad for him in the
19 Middlesex case at which point he went to Beth Din Maysharim and
20 said he wanted to have them hold a hearing to rescind the
21 heter.

22 THE COURT: When did he do that?

23 MR. NELKIN: Certainly, by in June of '14 I think is
24 in the record.

25 So a couple of months after he admittedly knew about

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1 the heter, and about six months after he knew about the summons
2 that he ignored. There is then a proceeding before the
3 Beth Din Maysharim that he submits to that he accepts their
4 jurisdiction of and where they hold a full hearing where he's
5 represented by a representative at, and they quizzed him about
6 all sorts of thing like why he ignored the summons.

7 THE COURT: Is there a transcript of that in the
8 record?

9 MR. NELKIN: What there is in the record is an
10 affidavit from one of the partners that says that he testified
11 about that.

12 THE COURT: Okay.

13 MR. NELKIN: At that point, he -- that results in a
14 September 25th ruling from Maysharim which they call "Psak or
15 "Psak Din." Another term to be aware of, Psak Din is defined
16 in some of the submissions such as the laymen's submissions.
17 It is a final award. There is also a case that we cited from
18 New York, I think it's the Kamar case that recognizes that a
19 "Psak" or "Psak Din" is a final arbitration award, and they
20 issued one in September 25th.

21 He then does not comply with that, he ignores it. And
22 worse than ignores it, he goes and runs to another Beth Din,
23 one that had been specifically rejected by Maysharim.

24 THE COURT: How do we know? What evidence does that
25 that it was?

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1 MR. SCHAFHAUSER: That's in the record. They had
2 asked each of the parties to submit potential Beth Dins and to
3 comment on the other parties' Beth Din.

4 THE COURT: We have records in this record here?

5 MR. NELKIN: Yes. You'll see partial -- I think
6 Mr. Schafhauser has attached at least one of those where
7 there is a letter from either me or Carol to the Beth Din
8 Maysharim responding to those commenting on those potential
9 Beth Dins.

10 So he submits a couple of Beth Dins. He knows
11 Machon L'hora and he submits a -- where his partner gave
12 hundreds of thousands of dollars in donations. He submits to
13 Bais Joseph where we raised a whole bunch of issues relating to
14 their intertangling in lawsuits that relate to our case. Some
15 donations that were made to them and other matters that we
16 thought rendered them inappropriate.

17 And Maysharim issued an order that says that he has to
18 escrow \$250,000 with one of three Beth Dins and he has to sign
19 an arbitration agreement with one of them things. He doesn't
20 do that; in fact, he runs to this other Beth Din, Beth Din
21 Bais Joseph, and he proceeds to have them go and send summons
22 to the plaintiff and the other members of Two Rivers saying
23 that they inappropriately went to Maysharim and that they have
24 Maysharim's ruling was invalid and ultimately resulting in him
25 being excommunicated for trying --

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1 THE COURT: Which group excommunicated him?

2 MR. NELKIN: Beth Din Bais Joseph.

3 THE COURT: Okay.

4 MR. NELKIN: For relying on that heter. And they do
5 all of that before the new Maysharim action.

6 The final excommunication order comes out. It's dated
7 Sunday, which was before Hanukah, December 13th, but it's not
8 mailed until December 17th. December 13th, as we note in our
9 papers, is an unusual day. It was the day before a hearing
10 where the parties agreed to have no further a standstill
11 agreement with regard to all Beth Din activities.

12 The plaintiffs believe that that document was actually
13 backdated to obscure the fact it was issued after the hearing,
14 particularly, since the hearing -- it took a very long time to
15 reach an agreement with respect to standing still on those
16 Beth Din issues.

17 The plaintiff repeatedly sought to arbitrate this with
18 Mr. Friedman, sent him a summons, and there is one other point
19 that I left out, I apologize.

20 Mr. Friedman, when he contacted the Beth Din Maysharim
21 in June, suggested to Beth Din Maysharim that he wanted to
22 pursue a Zabla proceeding. There was a number of objections to
23 do that, one of out of time based on their initial summons;
24 two, it was inappropriate for a number of reasons, the number
25 of parties and other things. And also the fact that there is

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1 Zabla proceeding is a known way to delay and stretch out, or
2 thwart, Beth Din proceedings. Because, basically, you have to
3 get two rabbis, one from each party, to agree on a third and
4 they have to agree on procedures. And, basically, you have to
5 set up and constitute an ad hoc Beth Din and agree to all the
6 procedures. When you have multiple parties and you don't have
7 just two, and when you have people like Mr. Friedman.

8 THE COURT: Was there ultimately an agreement in
9 July 2015 for the parties to submit to the jurisdiction of the
10 Maysharim.

11 MR. NELKIN: Yes. That's what resulted in the
12 hearing. And, at that hearing, he raised the issue of the
13 Zabla and they disregarded it and they said they thought that
14 was inappropriate.

15 THE COURT: So he submits to the jurisdiction of
16 Maysharim, and in that same time is when he talks about let's
17 do a Zabla, they say no, and then they issue this award saying
18 the heter will be withdrawn if?

19 MR. NELKIN: Correct.

20 Now, he again ignores that award runs and acts
21 completely inconsistent with it by obtaining multiple, well,
22 with Beth Din Bais Joseph repeatedly arguing that that award
23 was inappropriate and that it was contrary to Jewish law; that
24 it was invalid and so outrageous that it resulted in the
25 excommunication of my client and the others.

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1 Mr. Schafhauser argues that that's not inconsistent
2 with Maysharim's verdict, but it's certainly inconsistent with
3 the September award at the Psak Din.

4 THE COURT: He makes a point that you go there and try
5 to confirm this and try to get the Maysharim and give a
6 deadline and they don't give a deadline. So what does that
7 mean to the enforceability of this heter?

8 MR. NELKIN: On that, I would say it's important to
9 understand the deadlines for acting with regard to arbitration
10 awards both under the FAA and New Jersey law. Under the FAA,
11 you have 90 days to seek to vacate an award.

12 THE COURT: And you say the first issuance of the
13 heter was, in fact, an award?

14 MR. NELKIN: Yes. They use the term Psak, Psak Din.

15 THE COURT: When they issued the initial heter or
16 later?

17 MR. NELKIN: They referred to it as a Psak, and
18 Mr. Friedman testified it was a Psak. And he testified what a
19 Psak was.

20 THE COURT: But which award are we talking about?

21 MR. NELKIN: September.

22 THE COURT: We're talking about September.

23 MR. NELKIN: September.

24 THE COURT: Okay.

25 MR. NELKIN: And so, they issue that. He had two

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1 choices. He had 90 days to seek to vacate it, he didn't. I
2 should clarify it's 90 days from the receipt. In their papers,
3 you'll see some arguments that our filings to vacate some of
4 these other awards were untimely because they came a day or two
5 after the timeline they come after a receipt.

6 So the Beth Din Bais Joseph, which was postmarked --
7 and it's in the record, the postmark is the 17th, it wasn't
8 received until the 18th, so that's when that three-month
9 deadline would run from.

10 The same thing from the others in terms of receipt.
11 Others are from issuance, it depends on which law you're
12 looking at.

13 But the other alternative is 20 days for the
14 arbitrator to revise it upon a motion or request. While we
15 asked them to clarify certain things, we did that within the
16 20-day window, they chose not to. Mr. Friedman admits that
17 they chose not to.

18 But we believe that that was simply one within the
19 window that was able to be done, and when they chose not to do
20 it, it remained in place and final, at least from them, no
21 longer being able to alter its terms. But also once the
22 90 days changed, Mr. Friedman can't seek to reverse it or
23 vacate it.

24 THE COURT: But what's the affect of it not having a
25 deadline for him to comply with it?

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1 MR. NELKIN: The way that we understood that is that
2 we were entitled to go and file. We did not race to the
3 courthouse to do it. We tried to resolve it with him in a
4 number of options. First with the summons, then with the
5 heter, which he knew about. And after Maysharim ruled, for
6 four months, he just chose not to do anything and ultimately we
7 went to court.

8 And so, we feel that once we went to court that that
9 was -- we're in court and it cannot be withdrawn. It certainly
10 can't be withdrawn by the panel. They can't alter the terms,
11 and we feel that the record is clear that Mr. Friedman hasn't
12 complied with the terms anyway because he didn't deposit the
13 money with one of the three specified Beth Dins. He didn't
14 even deposit the money, someone else did.

15 And so, we also feel that there are a number of things
16 that we were unaware of that we're now aware of. For instance,
17 the fact that the overlap between judges with the Beth Din that
18 he seeks to go to, or I guess he says he doesn't have to go to
19 that one now anyway. And Machon L'hora where all the money is
20 involved. And so, we feel that to -- that failure disclose
21 those facts and --

22 THE COURT: Failure to disclose which facts?

23 MR. NELKIN: The fact that all the judges at the other
24 Beth Dins --

25 THE COURT: Which other Beth Din are we referring to?

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1 MR. NELKIN: The U'Mishapt. It terms out all the
2 judges --

3 THE COURT: I thought the U'Mishapt was one that they
4 allowed him to go to if they wanted to.

5 MR. NELKIN: They did, but he didn't until after we
6 filed a case. He didn't go to them or seek to go to them until
7 several months after we filed the case.

8 THE COURT: So after you filed the case, he goes to
9 one of the selected Beth Dins.

10 MR. NELKIN: Not exactly. What he did was, and we
11 don't understand it, certainly, seems suspicious to us, he goes
12 it Machon L'hora. He lives in Lakewood, the U'Mishapt is in
13 Brooklyn. He goes to Machon L'hora up in Monsey.

14 THE COURT: Which is where he lives?

15 MR. NELKIN: No he goes to Lakewood, all the way south
16 towards the Jersey Shore.

17 So he doesn't go to the one in U'Mishapt, he goes to
18 Machon L'hora. Someone else gives them money. Someone who has
19 a long history of making, I put air quotes around it,
20 "charitable contributions," to that institution. We know just
21 from the documents we submitted to the Court, tax filings,
22 \$695,000 worth of them, submits another 250,000, and
23 Mr. Friedman admits that that was not him that submitted it,
24 and --

25 THE COURT: Okay. But we're not at this -- when does

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1 get to the U'Mishapt?

2 MR. NELKIN: January 27th is when the document that
3 they submitted is signed. January 27, 2016.

4 THE COURT: So where is the money now, the 250,000?
5 That's not at --

6 MR. NELKIN: U'Mishapt. It's at Machon L'hora.

7 THE COURT: So does that fulfill that September 25th
8 order?

9 MR. NELKIN: Not in my mind. If it says you have to
10 deposit \$250,000 with one of these three, and you deposit it
11 with a fourth one that is not specified --

12 THE COURT: That's what I was asking you. Beth Din
13 U'Mishapt is one of the ones that's listed.

14 MR. NELKIN: One of the difficulties is that some of
15 the words overlap but they're different.

16 THE COURT: So it's not the same one.

17 MR. NELKIN: Machon L'hora, which may fit the term,
18 "Beth Tzedec" or not, Machon L'hora is an institution in
19 Monsey. It is a Beth Din in Monsey.

20 THE COURT: It is not one of the three?

21 MR. NELKIN: It is not one of the three that is
22 specified.

23 THE COURT: Okay. So he starts a proceeding there and
24 puts the money there?

25 The money is in Monsey?

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1 MR. NELKIN: The money in Monsey officially. We have
2 not seen any record of that, there has been no proof of it.
3 He, himself, testified that Joseph Friedman he thought gave it
4 to a building, he wasn't sure. He thought there might have
5 been a check back and forth. Maysharim appeared to believe it
6 was a result of a wire from Mr. Friedman; in fact, it was not,
7 we know that based on his testimony.

8 So Mr. Friedman did not deposit any money and he
9 didn't deposit -- no one deposited the 250,000 with any of the
10 three specified Beth Dins, and I believe that's undisputed.

11 My colleague can stand up if he disputes that but it's
12 undisputed.

13 The fact is as the case law makes it very clear. Your
14 Honor asked, well, how can you run it from one Beth Din to
15 another? The answer is you can't. There is a case we cite,
16 the Arrowood case, in our papers. It's very clear that once
17 you submit to one arbitration panel, you can't run to an
18 entirely different one and seek to overturn it. Your options
19 are to go back to the same panel within the 20 days, or to go
20 to Court within 90 days. We cited a bunch of law.

21 THE COURT: So your position is he'd already submitted
22 to the Maysharim when they came up with these conditions. So
23 he's already submitted to that one.

24 MR. NELKIN: Right. And one of the things that's at
25 issue here is that Mr. Friedman, notwithstanding his counsel's

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1 able argument, he's played games. If you look, it's in the
2 record. We quoted it at length in our briefs, but it's also, I
3 think, Exhibit 62 or 61 in our opposition.

4 Mr. Schafhauser, on the same day, that he that the
5 Beth Din Bais Joseph is issuing their first summons writes to
6 Maysharim and says, "You had no jurisdiction, there was never
7 an agreement to do anything. You have to write right to do
8 it."

9 We quoted at length because it's no counter to
10 somewhat he's trying to argue now, and that's a problem and I
11 think that's somewhat all the cases that we cite like Lane in
12 the Second Circuit, the other cases, they don't like people
13 playing games and ping-ponging back and forth and refusing to
14 arbitrate or thwarting arbitration processes, or claiming that
15 they'll arbitrate and then imposing conditions like you can't
16 have counsel representing you. Those are all things the courts
17 have said are inconsistent with a desire to arbitrate and they
18 result in a forfeiture of the right to arbitrate.

19 But one also has to question. Mr. Friedman claims
20 that he wants to arbitrate, but at each instance when he's
21 given a chance to arbitrate he chooses not to he ignores it.

22 In papers, he says, Well, earlier on, they asked me to
23 arbitrate before a secular panel and I want to go to a rabbinic
24 panel. Then, when he gets notice from the rabbinic panel, he
25 ignores it.

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1 When he gets the -- he learns of the heter, he sits on
2 it, doesn't go back to Maysharim for awhile. When he goes back
3 to Maysharim, and they issue the same, we'll give you a second
4 chance, just do these two or three things he refuses to do them
5 and doesn't do them.

6 And the case law is clear that when you -- the case
7 law is a lot clear -- that you don't have windows, like, a year
8 they took. One month, two months, three months. These type of
9 windows that are in the case law where that seemed --

10 THE COURT: What's import of your request for a
11 deadline and their failure to give it to you?

12 MR. NELKIN: We, again, don't believe that that had
13 any import once we filed the case. I think --

14 THE COURT: But you asked for that before you filed
15 the case.

16 MR. NELKIN: Our concern was, as your Honor has seen,
17 the pleadings in this case are a very extensive pleading, and I
18 think that there was some concern that we would be working in
19 reliance on the heter and then someone might try and rescind
20 and then we'd have an extra argument that there was -- that
21 that happened before we filed. But, in fact, that didn't
22 happen because he never was willing to arbitrate, and so, we
23 ultimately were able to complete the work and we filed. And
24 once you file --

25 THE COURT: And why didn't you answer the summons or

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1 your client answer the summons from the --

2 MR. NELKIN: We did. We answered them four times.

3 That's in the record.

4 THE COURT: What did you say?

5 MR. NELKIN: We said, you have no jurisdiction,
6 there's been a previous panel. We attached the heter. We ran
7 through all of the stuff. We said, Mr. Friedman lacked the
8 authority to go to it. We said, Here are the facts, and we did
9 it four times.

10 So that's four opportunities that Mr. Friedman had to
11 go and arbitrate before one of the three panels that they had
12 specified he was able to go to. He just didn't want to, and
13 so, he each time we respond and say, and all four of them are
14 in the record, we say, You should be aware that this happened;
15 you should be aware that there's no jurisdiction; you should be
16 aware that Mr. Friedman doesn't have the authority or the right
17 that I think we cited some of the case law like Arrowood and we
18 laid out facts there, and what we'd get in the response, and
19 the translations are there, and we spoke with all the junction
20 at Maysharim. So there is an ex parte communication admitted
21 to and we discussed this case. And after discussing it with
22 Maysharim, we, Beth Din Bais Joseph, believed that the
23 Maysharim had no authority to issue the heter and it's improper
24 and you can't rely on it and ultimately excommunicate my client
25 for relying on it.

Anthony D. Frisolone, FAPR, RDR, CRR, CRI, CSR
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1 THE COURT: That happened in January.

2 MR. NELKIN: No, the excommunication happened,
3 according to the dated document, December 13th. It was not
4 sent out until December 17th and not received until afterwards.

5

6 THE COURT: So how did it come about that Maysharim
7 issued the reversal? We don't know?

8 MR. NELKIN: We don't know. You will see in our
9 papers at the end of our opposition, we've made it clear, that
10 we received no discovery from the defendants. They have not
11 produced a single document.

12 THE COURT: Have you raised this with the magistrate
13 judge?

14 MR. NELKIN: We raised a number these issues with the
15 magistrate. We attached one of the things, a portion of the
16 transcript, where he says that future hearing they're seeking
17 to postpone or eliminate, he says that's one of the things that
18 we'll be discussing at the hearing -- the fact that they would
19 not allow to us inspect or take a look at documents we've
20 requested.

21 We've mentioned to the magistrate the fact that they
22 never responded to our subpoena related specifically to
23 Beth Din issues -- payments to Beth Dins, communications with
24 Beth Dins, questions like that we attached that in the record.
25 And we attached their opposition where they say these are

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1 irrelevant, these are not likely to lead to useful information.
2 That's all part of the record.

3 THE COURT: But it hasn't been resolved by the
4 magistrate these complaints?

5 MR. NELKIN: Not yet. There are also issues related
6 to the fact that other things have disappeared that are also
7 subject to letters to your Honor both from both parties related
8 to this hearing but where we mentioned it.

9 THE COURT: That's a hearing where you claim that
10 that, I mean, the claim is articles that you have requested in
11 discovery have been --

12 MR. NELKIN: The magistrate, I believe, has ordered to
13 go through different discovery issues at that hearing. But
14 there are other matters that are at that hearing, it's an
15 evidentiary hearing.

16 THE COURT: What do you understand the evidentiary
17 hearing to be about?

18 MR. NELKIN: At the very least, the evidentiary
19 hearing appears to be about two things in our understanding.

20 One is there was an order that certain computers were
21 to be turned over for imaging. We discovered -- we asked
22 counsel how many there were, he told us we felt that that was
23 insufficient based on our review of photographic evidence of
24 people walking out the door like Mr. Friedman with computers
25 under his arms in sworn afterwards that we entered into the

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1 record with Judge Orenstein.

2 Judge Orenstein ordered them to produce affidavits.

3 We had a hearing and he felt their affidavits were insufficient
4 and ordered them to produce new affidavits related to their
5 computers and where they possessed them and where they are now
6 and that sort of stuff. That's one issue.

7 The other issue is, pursuant to the preliminary
8 injunction, there is not supposed to be any concealment of
9 computers or any destruction of computer or electronically
10 stored information. Right after we got their objections to
11 our discovery request where they said we should refer to
12 Two Rivers's computer systems for those, or to Two Rivers
13 for those, Two Rivers launched computer system, which was
14 one of that primary system and has payroll whole bunch of key
15 records on it simply disappeared. Went offline, can't be
16 accessed.

17 The other defendants utilize that system, and so,
18 basically, we raised that issue with Judge Orenstein and I
19 believe that's an issue as well.

20 In addition, we raised the issue with the fact that
21 your Honor had gone through what type of discovery we're
22 entitled to. We had a discussion on the record which I think
23 we've attached a portion into the different submissions here as
24 an exhibit as to certain types of categories of information
25 that we were entitled to. We believe, your Honor, since we

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1 hadn't received those, we raised those with Judge Orenstein and
2 we attached a transcript where he says, That's for the hearing
3 that's coming up in a week or two.

4 So there are multiple matters of that, but some relate
5 to discovery issues and some relate to, for lack of a better
6 word, spoliation issues.

7 THE COURT: Spoliation of documents that you had
8 requested in discovery; correct?

9 MR. NELKIN: Correct. Spoliation issues taking place
10 subsequent to the filing of the case as opposed to prior to the
11 case.

12 THE COURT: Okay. All right. Thank you.

13 MR. SCHAFHAUSER: Your Honor, may I just briefly
14 respond to a couple of items that counsel addressed.

15 THE COURT: As long as it's not repeating what you
16 said the first hour you stood up.

17 MR. SCHAFHAUSER: And I will try my best.

18 Your Honor, asked counsel a question about an
19 agreement in July, and it's an important question that your
20 Honor asked.

21 Your Honor elicited the answer that the parties did,
22 in fact, agree to submit to Maysharim's jurisdiction in July.
23 Well, under the heter, which is Exhibit 7 to plaintiff's
24 papers, the heter says and I quote, "plaintiffs are allowed to
25 submit their claim against him in secular court so long as the

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1 defendant fails to accept upon him the authority of a
2 rabbinical court and the burden of Jewish law to signing an
3 arbitration agreement."

4 Your Honor just heard plaintiff admit through counsel
5 that Mr. Friedman did not fail to submit to the jurisdiction of
6 a rabbinical court. He indeed submitted to the jurisdiction of
7 a rabbinical court in July. So, therefore, as of that moment,
8 the terms of the heter were unenforceable.

9 Second point.

10 THE COURT: Well, the Maysharim must not have thought
11 so because in September they issued an order which said the
12 heter would be withdrawn but only on certain specific
13 circumstances. So they, obviously, didn't view it as withdrawn
14 in July.

15 MR. SCHAFHAUSER: The Maysharim ruled as it did.

16 THE COURT: Right.

17 MR. SCHAFHAUSER: There's no doubt about it. And
18 Maysharim --

19 THE COURT: So the way they interpreted their own word
20 wouldn't have been that, look, your showing up is all we need.

21 MR. SCHAFHAUSER: I suppose that is correct here, your
22 Honor, but if we're going to also adopt Maysharim's
23 interpretation of their own words. Maysharim also ruled in a
24 ruling that Mr. Friedman had complied with the directives that
25 your Honor is referring to and, in fact, did rescind the heter.

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1 And I respectfully submit that under the Federal Arbitration
2 Act that final ruling should be enforced.

3 But let me go back.

4 THE COURT: We've talked about all of that, is there
5 something that pertains to something new that --

6 MR. SCHAFHAUSER: Yes.

7 THE COURT: -- that counsel said?

8 MR. SCHAFHAUSER: Yes.

9 Counsel talked about a number of things such as your
10 Honor asked a question about where in the record is there
11 evidence that the heter was sent and served to plaintiff. And
12 counsel said, "Oh, it's in the record."

13 There's nothing to that I've seen in this record.
14 Counsel was also asked by your Honor and, again, burden is on
15 plaintiff on waiver. Counsel was also asked about what
16 happened.

17 THE COURT: Are you disputing the fact that the
18 Maysharim would send the heter to your client?

19 MR. SCHAFHAUSER: I am disputing that the heter was
20 sent to Mr. Friedman because I am, and as Mr. Friedman himself
21 testified to repeatedly, he was not aware of the heter until
22 April of 2015. And by the way, not even plaintiff says that he
23 told Mr. Friedman about the heter. Remember plaintiff has the
24 burden.

25 THE COURT: I know.

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1 MR. SCHAFHAUSER: There's no affidavit from plaintiff.

2 THE COURT: Okay.

3 MR. SCHAFHAUSER: Another issue.

4 As Mr. Schreiber's counsel asserts that he relied on
5 the directives of Maysharim dated September 25, 2015, but six
6 weeks before that directive was issued, counsel submitted time
7 sheets to Maysharim saying that in a matter entitled Schreiber
8 v. Friedman counsel, same counsel that's appearing today, had
9 billed 619 hours for a total of \$314,000 in August of last year
10 before, not after, but before the September 25th directive was
11 issued on researching and working on a matter that didn't even
12 yet exist entitled, Schreiber v. Friedman.

13 THE COURT: So that's relevant to what?

14 MR. SCHAFHAUSER: That's relevant to the lack of
15 reliance on the September 25th ruling and what --

16 THE COURT: You mean, why are we doing research if
17 we -- but that's research that occurred before the September
18 ruling.

19 MR. SCHAFHAUSER: It occurred before, not after. And
20 the reason it occurred before, your Honor.

21 THE COURT: What does that establish? I don't
22 understand your point.

23 MR. SCHAFHAUSER: My point, and I guess I didn't say
24 it well, so let me try again.

25 The reliance couldn't possibly have begun on

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1 September 25th when Maysharim issued its directive because
2 plaintiff was angling to file suit against Mr. Friedman well
3 before, months before. And the reason, your Honor, that this
4 suit was timed when it was most respectfully had nothing to do
5 with the heter or the rabbinical courts. It had to do with the
6 fact that --

7 THE COURT: I don't know why that's relevant.

8 Is there anything else, counsel, that you really feel
9 that you have to address because it's getting late.

10 MR. SCHAFHAUSER: Yes.

11 The other thing he talks about discovery. Plaintiff
12 has yet to produce a single document. He hasn't mentioned
13 that. Plaintiff has not produced.

14 THE COURT: Well, all of you can raise your discovery
15 issues with the magistrate judge.

16 To the extent that there's some request for staying
17 some proceeding before the magistrate judge, I'm not inclined
18 to stay any hearings that the magistrate judge has set. I
19 think they seem to deal with the issue of discovery and what
20 has taken place in the discovery that's been ordered so far.
21 If you have concerns, counsel, about the discovery that you
22 think that you've asked plaintiff's counsel for and haven't
23 gotten I think that you need to raise that with Judge Orenstein
24 at least in the initial.

25 MR. SCHAFHAUSER: Your Honor, may I just be heard on

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1 that because somewhat your Honor heard from plaintiff's counsel
2 today is not somewhat plaintiff's counsel.

3 THE COURT: Be heard on what? What part.

4 MR. SCHAFHAUSER: Heard on the scope of the hearing.
5 The scope of the hearing before Judge Orenstein. Your Honor
6 heard --

7 THE COURT: As to that, as to the scope of the hearing
8 before Judge Orenstein, I'll review your papers on that. I
9 know you've complained that the scope is too large and I'll
10 advise the parties at some point next week of my views on the
11 scope of it.

12 MR. SCHAFHAUSER: Very well. One last point I just
13 don't want to be in a position where plaintiff argues waiver so
14 I want to clearly say this, your Honor.

15 THE COURT: It's not in the 90 pages that you put in
16 your reply?

17 MR. SCHAFHAUSER: In response to what plaintiff said
18 this afternoon.

19 THE COURT: Okay.

20 MR. SCHAFHAUSER: My position, your Honor, so it's
21 clear, is that the Court can find that plaintiff did not bear
22 itself. If, however. If, however, the Court finds there's an
23 issue of fact as to waiver, yes, we would then submit that we
24 are entitled to discovery including a deposition, including the
25 other things that I outlined in the papers, and I'm certainly

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1 not waiving that request, nor the right of my client to a
2 hearing and discovery if your Honor does find that there are
3 issues of fact. I believe there aren't, but I just wanted to
4 put that on the record for that.

5 THE COURT: Okay. Fine. Thank you.

6 MR. SCHAFHAUSER: Thank you.

7 (End of proceedings.)

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